No. 77-334

In the Supreme Court of the United States

OCTOBER TERM, 1977

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL., APPELLANTS

v.

STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

Cases:

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This brief is submitted in response to the Court's order of November 14, 1977, inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court (J.S. App. A 27–45) is not yet officially reported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on May 3, 1977 (J.S. 3).

The appeal was filed on July 20, 1977 (J.S. App. B 47–49), and probable jurisdiction was noted on November 14, 1977.

The Supreme Judicial Court of Massachusetts held that a state excise tax imposed upon appellants, the federal savings and loan institutions located in Massachusetts, did not violate Section 5(h) of the Home Owners' Loan Act of 1933, as amended, 76 Stat. 984, 12 U.S.C. 1464(h), the Commerce Clause, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The jurisdiction of this Court rests on 28 U.S.C. 1257(2), which authorizes an appeal to this Court from the final judgment by the highest court of a state where the validity of a statute of any state is drawn into question on the ground that it violates the Constitution or laws of the United States, and the decision is in favor of its validity. See, *e.g.*, *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339; *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268.

STATUTORY PROVISIONS INVOLVED

Section 5(h) of the Home Owners' Loan Act of 1933 and Section 11, ch. 63, Massachusetts General Laws, are set forth in the Appendix, *infra*, pp. 1a–3a.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Massachusetts excise tax imposed upon federal savings and loan associations and measured by their net operating income, violates Section 5(h) of the Home Owners' Loan Act of 1933, which provides that "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such * * * [State] on other similar local mutual or cooperative thrift and home financing institutions."

STATEMENT

1. Appellants are the federal savings and loan associations located in the Commonwealth of Massachusetts (J.S. App. A 28). They are chartered and regulated by the Federal Home Loan Bank Board, an independent federal agency created by Congress in 1932 to meet the needs of the housing and mortgage markets in the United States. See Federal Home Loan Bank Act, 47 Stat. 725, as amended, 12 U.S.C. 1421–1449. In accordance with the statutory purpose, federal savings and loan associations act as local mutual thrift institutions for the investment of funds and for the financing of housing. See Section 5(a), Home Owners' Loan Act of 1933, 48 Stat. 132, 12 U.S.C. 1464(a).

Membership and ownership of savings accounts in a federal savings and loan association are not restricted. With certain exceptions, such an association may make loans on the security of a first lien on real estate, primarily residential, located within 100 miles of its home office or within the state of its home office,

on the security of its shares, or on the security of obligations of the federal government or its agencies. A federal savings and loan association may lend up to 40 percent of its assets on the security of first liens on real property without regard to the location of the property. It may also make certain housing loans guaranteed by the Veterans Administration and the Federal Housing Authority without regard to the location of the residence and may lend up to five percent of its assets on unsecured educational loans without any restrictions as to the residence of the borrower. See Section 5(c), Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. (and Supp. V) 1464 (c); Federal Home Loan Bank Board Regulations 12 C.F.R. 545.6–1 *et seq.*; J.S. App. D 53–59. The holding of shares in a federal savings and loan association is not a prerequisite for obtaining a loan from such an institution. (J.S. App. A 44).

Prior to April 10, 1970, the Federal Home Loan Bank Board required each federal savings and loan association to accumulate a capital reserve equal to 10 percent of its capital at the rate of five percent of net earnings every six months. Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.1. On March 4, 1970, the Board eliminated this requirement and authorized the federal savings and loan associations to amend their charters to delete the capital reserve provisions. See 35 Fed. Reg. 4044; Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.8. However, a federal savings and loan association is still required by law to maintain a reserve, which varies from 0.5

percent of its deposits as of the second anniversary of its charter to five percent of its deposits as of the twentieth anniversary of its charter.[1] See Section 403 (b) of the National Housing Act, 48 Stat. 1257, as amended, 12 U.S.C. 1726(b); Federal Home Loan Bank Board Regulations, 12 C.F.R. 563.13(a).

In 1966, the Commonwealth of Massachusetts extended its excise tax upon savings banks and similar institutions to federal savings and loan associations, which previously had been exempt from it. Under the 1966 amendment, an excise tax is imposed on savings banks, cooperative banks and state or federal savings and loan associations. The tax is measured by percentages of deposits and of net operating income. See Mass. Acts 1966, ch. 14, Section 11; Mass. Gen. Law, ch. 63, Section 11, Appendix, *infra,* pp. 1A–3A.

2. As a result of previous litigation, appellants and the federal government had established that federal savings and loan associations were exempt from the Massachusetts excise tax as it is measured by deposits. The court had held that the excise tax on deposits caused a "greater" tax upon federal associations than upon "other similar" state-chartered savings banks and was therefore barred by Section 5(h) of the Home Owners' Loan Act of 1933, Appendix, *infra,*

[1] Section 403(b) of the National Housing Act was amended by Section 707 of the Emergency Home Finance Act of 1970, 84 Stat. 463, to allow the Federal Savings and Loan Insurance Corporation to extend the 20-year limitation by not more than ten years upon the determination that such action was necessary to meet mortgage needs.

p. 1A. That statute provides that "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." See *United States* v. *State Tax Commission,* 481 F. 2d 963 (C.A. 1), affirming in pertinent part 348 F. Supp. 397 (D. Mass.).

Appellants thereafter brought this suit in the Massachusetts Superior Court seeking a declaration that the Massachusetts excise tax on federal savings and loan associations as measured by their net operating income was unconstitutional or barred by federal statute. The Superior Court reserved decision and reported the case to the Supreme Judicial Court. Thereafter, the Supreme Judicial Court granted appellants' request for direct appellate review (J.S. App. A 27).

Appellants claimed, *inter alia,* that the Massachusetts tax violates Section 5(h) of the Home Owners' Loan Act of 1933, which provides that no tax on a federal savings and loan association shall be "greater than that imposed" by the state on similar local thrift and home financing institutions. Appellants contended that the state tax on their "net operating income" is greater than that imposed on similar local institutions because the deduction available to a federal savings and loan association for "minimum additions * * * to its guaranty fund or surplus required by law or the appropriate federal and state

supervisory authorities" (Mass. Gen. Laws, c. 63, Section 11), is generally lower than the deduction available to a similar state savings institution (J.S. App. A 39).

While the court acknowledged that state savings institutions would generally have available a larger deduction than federal savings and loan associations, it rejected appellants' claim that the difference in treatment violated Section 5(h) of the Home Owners' Loan Act. In the court's view, "[t]he cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations" (J.S. App. A 40). The court therefore concluded that the Commonwealth of Massachusetts was not the source of the discrimination because its excise tax statute was wholly neutral (*ibid.*).

Appellants also argued that because the Massachusetts excise tax does not apply to credit unions, it is not imposed "on other similar local mutual or cooperative thrift and home financing institutions," and therefore violates Section 5(h) of the Home Owners' Loan Act.[2] The court stated that "[t]here is no ques-

[2] Massachusetts-chartered credit unions are required to provide in their by-laws the conditions of residence, occupation or association which qualify persons for membership. See Mass. Gen. Laws, ch. 171, Section 7(c) (1977). There are limits upon the amounts that an individual may deposit. These limits depend upon the amount of assets of the corporation. Mass. Gen. Laws, ch. 171, Section 10 (1977). Although credit unions having assets in excess of $500,000 may make first mortgage loans on real estate located within 35 miles of the home office or within Massachusetts of up to 80 percent of their shares, deposits, guaranty and reserve funds and undivided earnings (Mass. Gen. Laws, ch. 171, Section 24(B)

tion that a credit union is a 'local mutual or cooperative thrift and home financing institution'" within the meaning of the federal statute (J.S. App. A 42). However, it concluded that the Massachusetts excise tax did not violate Section 5(h) of the Home Owners' Loan Act because a credit union is not "similar" to a federal savings and loan association within the meaning of that statute.

The court observed that "[t]he test for similarity is not what each institution might do but rather what each does in fact * * *" (J.S. App. A 43). The court pointed out that credit unions in practice invest a far lesser proportion of their funds (30.1 percent) in real estate first mortgage loans than federal savings and loan associations (87.7 percent) (J.S. App. A 44).

SUMMARY OF ARGUMENT

A.

Section 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(h), provides: "No State * * * shall impose any tax on * * * [federal savings and loan] associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such * * * [State] on other similar local mutual or cooperative thrift and home financing institutions." In characterizing the statute, this Court stated: "This

(*b*) (4) and (7) (1977)), they must give priority to personal loans (Mass. Gen. Laws, ch. 171, Section 24; J.S. App. D 54–59). Credit unions may make loans only to their members (Mass. Gen. Laws, ch. 171, Sections 2, 21, 24 (1977)).

provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission,* 365 U.S. 517, 523.

Massachusetts imposes an excise tax measured by net operating income and deposits upon every savings bank, cooperative savings bank, and savings and loan association. There is, however, an exemption from the tax for Massachusetts credit unions. While the Supreme Judicial Court of Massachusetts acknowledged (J.S. App. A 42) that Massachusetts credit unions were "local mutual or cooperative thrift and home financing institution[s]," it held that they were not "similar" to federal savings and loan associations within the meaning of Section 5(h) of the Home Owners' Loan Act.

We agree with appellants that the court below erred in concluding that Massachusetts credit unions were not "similar" to federal savings and loan associations. Both types of institutions have: (1) mutuality of ownership and control; (2) the ability to attract savings; and (3) the ability to make first mortgage residential real estate loans on substantially the same terms. While credit unions may make loans only to members and are required to give "preference" to personal loans (Mass. Gen. Law, ch. 171, Section 24 (1977)), these distinctions do not justify the conclusion of the court below that a Massachusetts credit union is not "similar" to a federal savings and loan association. Although there are no statutory limita-

tions on the membership of a credit union, the smallest deposit will qualify a prospective borrower as a member. Moreover, there is no enforcement of the statutory "preference" in favor of personal loans. Indeed, in 1972, Massachusetts credit unions had 42 percent of their total loans in real estate mortgages. As of the end of the following year, they had $329 million in outstanding mortgage loans.

Thus, both credit unions and federal savings and loan associations perform the same functions of attracting savings and making loans, substantial amounts of which are first mortgage residential loans. They are accordingly "similar" within the meaning of Section 5(h) of the Home Owners' Loan Act. Since Massachusetts credit unions are exempt from the Massachusetts excise tax to which federal savings and loan associations are subject, the tax is invalid under that federal statute.

B.

Appellants also argue that the portion of the excise tax measured by net operating income is greater upon federal savings and loan associations than upon similar Massachusetts-chartered banks because federal savings and loan associations have a lesser deduction available for required additions to reserves. While federal associations do have a lesser reserve deduction than similar state institutions, we do not believe that this fact demonstrates of itself that federal associations pay a greater tax than similar Massachusetts savings banks in violation of Section 5(h) of the

House Owners' Loan Act. That statute prohibits "only those systems of state taxation which discriminate in practical operation against [federal savings and loan associations]" (*Tradesmen Nat. Bank* v. *Oklahoma Tax Commission,* 309 U.S. 560, 567). As a result of the decision in *United States* v. *State Tax Commission,* 481 F. 2d 963 (C.A. 1), federal savings and loan associations are not required to pay the portion of the Massachusetts excise tax measured by deposits. However, Massachusetts-chartered savings institutions are required to pay both the portion of the tax measured by deposits and that measured by net operating income. Since appellants have not shown that the discrimination caused by the lesser reserve deduction was not compensated for by the judicial exemption for federal savings and loan associations from the tax measured by deposits, we do not believe that the lesser reserve deduction violates Section 5(h) of the Home Owners' Loan Act.

ARGUMENT

THE MASSACHUSETTS EXCISE TAX MEASURED BY THE NET OPERATING INCOME OF SAVINGS BANKS AND SAVINGS AND LOAN ASSOCIATIONS IS INVALID AS APPLIED TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS

A. INTRODUCTION

Since *McCulloch* v. *Maryland,* 4 Wheat. 316, announced the rule that a bank chartered by the United States to perform a federal function was immune from state taxation under the Supremacy Clause, such

institutions have been consistently regarded as tax-exempt instrumentalities of the federal government, except to the extent that Congress has waived their immunity from state taxation. See, *e.g.*, *Agricultural Bank* v. *Tax Commission,* 392 U.S. 339, 340; *United States* v. *State Tax Commission,* 481 F. 2d 963, 969 (C.A. 1); *First Federal Savings and Loan Ass'n* v. *Loomis,* 97 F. 2d 831, 837 (C.A. 7). See also *Mercantile Bank* v. *New York,* 121 U.S. 138, 154.

Although Congress has waived the immunity of federal savings and loan associations from state taxation, it has prohibited the states from imposing discriminatory taxes upon them. Section 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(h), Appendix, *infra,* p. 1A, provides: "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." "This provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission,* 365 U.S. 517, 523.

In construing a similar statute (Rev. Stat. 5219, as amended, 12 U.S.C. 548), which bars state taxation of the shares of national banks "at a greater rate than is assessed upon other moneyed capital * * * coming into competition with the business of national banks * * *," this Court observed that Congress intended "to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class." *Tradesmens Nat. Bank* v. *Oklahoma Tax Commission,* 309 U.S. 560, 567; *Michigan Nat. Bank* v. *Michigan,* 365 U.S. 467, 473.

Here, Massachusetts imposes upon every savings bank, cooperative savings bank, and savings and loan association an excise tax measured in part by deposits or savings accounts and share capital and in part by net operating income. This litigation focuses upon the portion of the tax measured by net operating income.

Appellants advance two principal contentions that Section 5(h) of the Home Owners' Loan Act of 1933 bars the tax as measured by net income. First, they contend that the state tax exemption for Massachusetts credit unions results in discriminatory taxation in violation of Section 5(h) of the Home Owners' Loan Act of 1933. Second, appellants contend that the tax is greater as applied to a federal savings and loan association because the latter has a lesser deduction available for required additions to its guaranty fund or surplus.[3]

[3] Appellants also argue (Br. 61–72) that the tax violates the Commerce Clause and the Due Process Clause because of its failure to provide for apportionment between Massachusetts and non-Massachusetts income. They also urge (Br. 73) that the use of different methods of computing the deduction for additions to the reserve violates the Equal Protection Clause. Since we submit that the case can be disposed of on the basis of Section 5(h) of the Home Owners' Loan Act of 1933, we do not address appellants' constitutional contentions.

B. THE EXEMPTION FOR MASSACHUETTS CREDIT UNIONS VIOLATES SECTION 5(h) OF THE HOME OWNERS' LOAN ACT

Appellants argue (Br. 30–46) that the Massachusetts excise tax is invalid as applied to federal savings and loan associations because it is not imposed upon Massachusetts credit unions. While the court below acknowledged (J.S. App. A 42) that Massachusetts credit unions were "local mutual or cooperative thrift and home financing institution[s]," it concluded that they were not "similar" to federal savings and loan associations within the meaning of Section 5(h) of the Home Owners' Loan Act.

We agree with appellants that the court below erred in holding that Massachusetts credit unions were not "similar" to federal savings and loan associations. Section 5(h) of the Home Owners' Loan Act prohibits a state from imposing upon federal savings and loan associations any tax greater than that imposed upon "similar" local mutual or cooperative thrift and home financing institutions. But the statutory term "similar" does not mean identical. The policy of Section 5(h) is to insure that the states do not put federal savings and loan associations to any competitive disadvantage *vis-a-vis* local savings institutions.

Here, as appellants correctly point out (Br. 36), Massachusetts credit unions and federal savings and loan associations are similar with respect to three fundamental elements: (1) mutuality of ownership and control; (2) the ability to attract savings; and (3) the ability to make first mortgage residential real estate loans on substantially the same terms and to

substantially the same extent as federal savings and loan associations. Specifically, credit unions have the statutory authority to make loans secured by first mortgages on real estate for terms up to 30 years, for 90 percent of the value of the property, and to a maximum amount of $40,000. See Mass. Gen. Laws, ch. 171, Section 24(B)(*a*)(4) and (*b*)(8) (1977). Federal savings and loan associations may also make real estate loans for a maximum term of 30 years, for 80 percent of the value of the property, and to a maximum amount of $55,000. See 12 U.S.C. (and Supp. V) 1464(c); 12 C.F.R. 545.6–1(a)(1)(i).

While credit unions may make loans only to members and are required to give "preference" to personal loans (Mass. Gen. Laws c. 171, Section 24 (1977)), these distinctions do not establish that a Massachusetts credit union is not "similar" to a federal savings and loan association. There are no statutory limitations on the membership of a credit union, and the smallest deposit will qualify a prospective borrower as a member. Moreover, there is no statutory enforcement of the "preference" in favor of personal loans. Indeed, as the court below observed (J.S. App. A 44), in 1972 Massachusetts credit unions had 30.1 percent of their total dollar investments in real estate mortgages and 42 percent of their total loans were in real estate mortgages.

These statistics demonstrate that Massachusetts credit unions are in all pertinent respects "similar" to federal savings and loan associations. Both credit unions and federal savings and loan associations per-

form the same functions, *viz.*, they attract savings upon which they pay interest, and make loans, substantial amounts of which are first mortgage residential loans.

In view of these similarities, the exemption for Massachusetts credit unions from the Massachusetts excise tax to which federal savings and loan associations are subject renders the tax invalid as applied to such federal institutions under Section 5(h) of the Federal Home Owners' Loan Act.[4]

C. THE LESSER DEDUCTION FOR REQUIRED ADDITIONS TO RESERVES AVAILABLE TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS DOES NOT RESULT IN THE IMPOSITION OF A GREATER OVERALL STATE TAX UPON SUCH FEDERAL INSTITUTIONS THAN UPON SIMILAR MASSACHUSETTS-CHARTERED BANKS

Appellants also argue (Br. 20–30) that the portion of the excise tax measured by net operating income is

[4] The court below (J.S. App. A 42) relied upon the decisions of other courts, which it characterized as holding that federal savings and loan associations are not similar to state-chartered credit unions. See *First Federal Savings & Loan Assn.* v. *Connelly*, 142 Conn. 483, 115 A. 2d 455, appeal dismissed for want of a substantial federal question, 350 U.S. 927; *State* v. *Minnesota Federal Savings & Loan Ass'n*, 218 Minn. 229, 15 N.W. 2d 568; *Manchester Sav. & Loan Ass'n* v. *State Tax Commission*, 105 N.H. 17, 191 A. 2d 529.

But the Connecticut decision did not focus upon the differences between state-chartered credit unions and federal savings and loan associations. Rather, the Connecticut court upheld a constitutional challenge to a state income tax on savings and loan associations which did not permit a deduction for dividends paid.

Moreover, the competitive impact of the credit unions for savings and mortgage dollars involved in the Minnesota and New Hampshire decisions was considerably more limited than that of the Massachusetts credit unions. There were 374 Minnesota credit unions having 75,297 members and $2,172,000 in real estate mortgage loans (218 Minn. at 232, 15 N.W. 2d at 570). Likewise, the New Hampshire court observed "* * * that credit unions have smaller assets, grant more unsecured loans and fewer real estate loans, own less property and real estate, than the plaintiffs [federal savings and loan associations] and other banks" (105 N.H. at 20, 191 A. 2d at 532). Here, however, as of the end of 1973, Massachusetts credit unions had more than $329 million in mortgage loans outstanding. See *Annual Report of the Commissioner of Banks*, Commonwealth of Massachusetts, Division of Banks and Loan Agencies, Section B (Credit Unions), pp. 80–81 (1973). We have been advised by appellants that they are lodging a copy of this report with the Clerk.

Finally, the Minnesota decision, which the New Hampshire court followed, turned principally upon the equal protection ground that the classification between credit unions and savings banks was based "on a reasonable ground * * * for purposes of taxation" (218 Minn. at 239, 15 N.W. 2d at 573). The Minnesota court concluded that since the exemption of credit unions did not violate the Equal Protection Clause of the Fourteenth Amendment, it did not violate Section 5(h) of the Home Owners' Loan Act (218 Minn. at 238–241, 15 N.W. 2d at 523–524).

But this conclusion by no means follows. The courts have traditionally permitted the states great latitude for equal protection purposes in making classifications for tax purposes. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356. In contrast, Section 5(h) of the Home Owners' Loan Act contains an absolute prohibition upon taxation of federal savings and loan associations that is greater than that imposed upon similar state-chartered institutions.

greater upon federal savings and loan associations than upon similar Massachusetts-chartered banks because federal savings and loan associations have a lesser deduction available for required additions to

reserves.[5] Although circumstances may vary from year to year, the court below stated (J.S. App. A 39) that "we accept the associations' assertion that, generally, the required contributions of a Federal savings and loan association to its surplus are less than those of similarly situated Massachusetts savings and cooperative banks."[6] However, it rejected appellants' contention that the difference in deductions was discrimination that Section 5(h) of the Home Owners' Loan Act prohibits.

[5] In 1966, at the time Massachusetts instituted the tax, the legally required additions to guaranty funds for federal savings and loan associations and Massachusetts cooperative banks were essentially the same. Massachusetts cooperative banks were required to establish and maintain a guaranty fund equal to at least 10 percent of their assets at the annual rate of 5 percent of net profits. Mass. Gen. Laws, ch. 170, Section 38 (1977). Federal savings and loan associations were likewise required to establish and maintain a capital reserve equal to 10 percent of their capital at the rate of 5 percent of net earnings every six months. Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.1. Massachusetts savings banks are required to establish and maintain a reserve at least equal to 7½ percent of deposits at the annual rate of ⅛ to ¼ of one percent of deposits. Mass. Gen. Laws, ch. 168. Section 58 (1977).

[6] On April 10, 1970, the Federal Home Loan Bank Board reduced the reserve requirements of the federal savings and loan associations. The new requirements varied from 0.5 percent of deposits on the second anniversary of their charters to five percent of deposits on the 20th anniversary of their charters. The time within which a federal association could reach the five percent level could be extended for ten years in special circumstances. Section 403(b) of the National Housing Act, 48 Stat. 1257, as amended, 12 U.S.C. 1726(b); 35 Fed. Reg. 4044; Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.8, 563.13(a). The reduction in the reserve requirements was intended to permit federal savings and loan associations to attract more funds by paying dividends at the maximum rate allowed by law. H.R. Rep. No. 91-1131, 91st Cong., 2d Sess. 15 (1970).

In the court's view, "The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination. The excise tax is wholly neutral" (J.S. App. A 40).

We agree with appellants that the difference in treatment cannot be justified, as the court below concluded, on the ground that the cause of the discrimination was the lower reserve requirements the Federal Home Loan Bank Board imposes and not the state statute. The prohibition of Section 5(h) of the Home Owners' Loan Act is clear: "No State * * * shall impose any tax on such [federal] association * * * *greater than that* imposed * * * on other similar local * * * institutions (emphasis added)" Since "[t]his provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations" (*Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission, supra,* 365 U.S. at 523), the source of the discrimination—the fact that in this case it arose from the lesser federal requirements for additions to reserves—is irrelevant.

Moreover, we would agree that appellants' claim of discrimination would have considerable force if the Massachusetts excise tax were measured solely by net operating income. But we do not believe that the difference in reserve requirements violates Section 5(h) in the context of this case involving a tax measured by both net operating income and deposits. As a result of the decision in *United States* v. *State Tax Commission, supra,* federal savings and loan associations are not required to pay the portion of the Massachusetts

excise tax measured by deposits or savings accounts and shares. However, Massachusetts savings and co-operative banks are required to pay both the portion of the tax measured by deposits and that measured by net operating income. Since Section 5(h) prohibits "only those systems of state taxation which discriminate in practical operation against * * * [federal savings and loan associations]" cf. *Tradesmens Nat. Bank,* v. *Oklahoma Tax Commission, supra,* 309 U.S. at 567; *Michigan Nat. Bank* v. *Michigan, supra,* 365 U.S. at 473), appellants could prevail on their claim only by showing that the discrimination arising from the lesser reserve deduction was not compensated for by judicial exemption from the tax measured by deposits. Without that showing, the lesser reserve deduction available to federal savings and loan associations does not demonstrate of itself that such institutions pay a greater tax then similar Massachusetts savings banks. Since appellants have not made such a showing, the tax cannot be invalidated on that ground.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

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JANUARY 1978.

APPENDIX

Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. 1421 *et seq.*:

Section 5. * * * *

* * * * *

(h) [as amended by Sec. 6(e), Revenue Act of 1962, 76 Stat. 960, 984]. No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Mass. Gen.' Laws, Ann. Laws of Mass. (1977 Cum. Supp.), ch. 63:

Section 11. ***Savings Banks, Co-operative Banks, and Savings and Loan Associations Required to Pay Annual Excise.***

Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of

one per cent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by the commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and

(*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income; and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the

mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable year to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

U.S. GOVERNMENT PRINTING OFFICE: 1970